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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1556

DUANE LEE VINCENT,
Appellant/Petitioner,

vs.

UNITED STATES OF AMERICA,
Appellee/Respondent.

PETITION FOR WRIT OF CERTIORARI

MARTIN W. MITCHELL
ADAMS, BROOKING, STEPNER
& MITCHELL

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Covington, Kentucky 41011

I hereby certify that I have deposited the foregoing Petition in the U.S. Post Office, first class postage prepaid addressed to Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and Eugene Siler, Federal Building, Lexington, Kentucky on the ...9... day of ...JUNE..., 1975. A copy of the Solicitor Generals was sent air-mail, postage prepaid pursuant to Rule 28.

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I. OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is set out in full in the Appendix No. 1 but is not officially reported. The case is styled No. 74-2218, United States of America vs. Duane Lee Vincent.

II. JURISDICTION

This is a criminal appeal. An order was entered on February 20, 1975 by the United States Court of Appeals for the Sixth Circuit on February 20, 1975 affirming the District Court's judgment of conviction. A motion was made by Petitioner on March 5, 1975 for an extension of time to file a petition for re-hearing. This motion was denied on March 28, 1975. On April 8, 1975 a motion

was made by Petitioner to stay the mandate in order to file a petition for writ of certiorari to this Court. This motion has not been ruled upon.

A copy of the order of the Sixth Circuit Court of Appeals is appended hereto.

The jurisdiction of this Court is invoked under 28 USC Section 1254 (1). The Petitioner is a party to a criminal action on which judgment was rendered in the United States Court of Appeals for the Sixth Circuit affirming judgment of conviction by the lower Court.

III. STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. The sole issue on appeal is that the District Court improperly discharged its duty to impose an appropriate sentence and abused its discretion in imposing a sentence of twelve (12) months imprisonment, the maximum permissible under the U.S. Code, without ascribing any reason therefor.

IV. STATEMENT OF THE CASE

This is an appeal from the sentence imposed by the U.S. District Court for the Eastern District of Kentucky. An information was returned under Title 26, Section 7203 U.S. Code for failing to file income tax returns on three counts, i.e. failing to file income tax returns for three years (1968-69-70). The Defendant-Appellant on arraignment pleaded not guilty to Counts 1 and 2, and guilty to Count 3. On Motion of the United States Attorney, Counts 1 and 2 were dismissed. U.S. District Judge Mac Swinford sentenced the Defendant-Appellant to twelve (12) months imprisonment on the one count, the maximum incarceration permissible under the Code.

The following facts provide the background against which this appeal should be heard:

The Appellant-Plaintiff is a practicing Kentucky attorney with offices in Florence, Kentucky. He entered the practice of law in 1964. He is married and has four children. One child, Richard, became afflicted with epilepsy during 1968, which condition caused such continuous great mental strain and anxiety to the Appellant-Plaintiff that it caused him to become derelict in the handling of his own affairs, and led to the failure to file his income tax returns for 1968, 1969 and 1970.

The Appellant-Plaintiff is now 46 years of age and possesses a good reputation in his community. The Pre-Sentencing Memorandum which Judge Mac Swinford refused to make part of the record in this case included as exhibits, statements from the following, attesting to the good character and reputation of the Appellant-Plaintiff:

(a) C. M. Ewing, Mayor of Florence, Kentucky
(b) Boone County Planning Commission
(c) Lee Lanter, County Attorney, Grant County, Kentucky
(d) Warren E. Kelly, Executive of Boone County Lumber Co.
(e) Wm. P. McEvoy, County Attorney, Boone County, Kentucky
(f) John M. Krumpelman, Realtor and Banker
(g) R. C. Durr, General Contractor.

A pre-sentencing investigative report was prepared by the Probation Service and submitted to Judge Mac Swinford. This report was most favorable to the Appellant-Defendant, and probation was recommended therein. This investigative report was not made part of the record, as the Court

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overruled the Defendant-Appellant's motion to have the report made part of the record on appeal. In *U.S.* v. *Kaylor,* 491 F.2d 1133 (1974), page 1134, the Court ruled that "A failure to exercise discretion with respect to disclosure of presentence reports on part of district court is reviewable." The Court cited *States* v. *Brown,* 470 F.2d 285 (2nd Cir. 1973), for its finding. It is strongly urged that the contents of the investigative report should be known to the United States Supreme Court in order that it may be fully informed and pass on the issue of gross abuse of discretion by the District Judge.

The Appellant-Plaintiff has never been convicted of any crime. In his role as attorney for the Boone County Planning Commission (Kentucky) he made significant contributions to the economic well being of the citizens of that County, at the extreme financial sacrifice to himself.

The information returned against the Appellant-Plaintiff under Title 26, Section 7203, United States Code, for 1970, the year on which he was sentenced indicated:

Gross Income	—	$23,515.00
Income Tax	—	2,010.00

V. SUMMARY OF ARGUMENT

The Defendant-Appellant will be identified as the "defendant" for all purposes herein.

The defendant pleaded guilty to a single count under Section 7203, United States Code. This section is entitled "Wilful failure to file return, supply information, or pay tax." A violation of this section is a misdemeanor and the penalty is a fine of not more than $1,000.00, or imprisonment for not more than one year, or both, together with the costs of prosecution.

The District Court passed a sentence on defendant of one year imprisonment, being the maximum incarceration

permissible under the Code. The maximum imprisonment was given despite the fact that the defendant pleaded guilty, had no prior convictions, possessed an enviable reputation in the community, and owed but a relatively small tax, which he has paid in full.

Although the general rule bars review of the exercise of sentencing discretion, limited review is available when sentencing discretion is improperly exercised or as in this case, is not exercised at all.

In *United States* v. *Daniels,* 446 F.2d 967, 972 (CA 6-1971), the defendant was also convicted before Judge Swinford in the U.S. District Court for the Eastern District of Kentucky, for failing to comply with an order of the local selective service board. The Court sentenced the defendant to the maximum five-year imprisonment. The Court of Appeals affirmed, but remanded for reconsideration the five-year sentence. The sentence was suspended and the defendant placed on probation for twenty-five (25) months. The Court in its opinion, page 972, in discussing Judge Swinford's sentencing procedures, states as follows:

> "Third, we are disturbed by the District Court's failure to conceive of the sentencing procedure in terms of the modern penological philosophy praised by the United States Supreme Court in *Williams* v. *New York,* supra. In *Williams* v. *New York,* supra, at 248, 69 S.Ct. 1079, the United States Supreme Court cited with approval certain basic considerations to be used in determining an appropriate sentence: (a) the reformation of the offender. (b) the protection of society, (c) the disciplining of the wrongdoer, and (d) the deterrence of others from committing like offenses."

The imprisonment of the defendant (Duane Lee Vincent) cannot be deemed helpful or constructive in reforming a 46 year old married man with heavy domestic

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responsibilities, concededly with good character and certainly not a danger to society, and was unnecessary to the deterrence of others.

We acknowledge that in general the severity or duration of punishment imposed by a trial court is not subject to modification where the sentence imposed is within the requisite legislative limits. *Gore* v. *United States,* 357 U.S. 386, 78 S.Ct. 1280 (1958). The process of sentencing an offender, however, is not wholly immunized from judicial review solely because the sentence imposed upon the offender falls within certain statutory limits. As stated in *Williams* v. *State of Oklahoma,* 358 U.S. at 585 (1959), 79 S.Ct. at 427, the Court held that:

> "In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."

In this case Judge Swinford did not consider any of the many mitigating circumstances present in this case, but routinely and matter-of-factly imposed the maximum sentence, all for failing to file and pay a 1970 tax liability of $2,010.00 income tax and $538.00 Social Security tax.

In *U.S.* v. *John Burton Moody,* 371 F.2d 688 (CA 6-1967), the defendant was convicted on a four-count indictment of wilful evasion of federal income taxes (a felony) and appealed. Judge Edwards of this Court of Appeals held that in the absence of a prior felony record, administration of a maximum five-year concurrent sentence was excessive, and sentences totalling less than half of the sentence actually imposed would satisfy federal interest in violation of its tax laws. This case was remanded for reconsideration of the prison sentences. In *Moody* the defendant filed fraudulent returns, and the amount of

the tax evasion was substantial. Furthermore, the defendant was guilty of fraud, and it was proved to be planned, designed and premeditated.

Compare the subject defendant, Duane Lee Vincent. He was given the maximum prison sentence despite the fact that his crime was a misdemeanor, the tax involved was small, he had extreme personal, extenuating circumstances in the illness of his son, and he pleaded guilty, thus conserving expense and time of the Government. Also absent was any willfulness, or planned evasion of tax. It is also pertinent to point out that in contrast, the defendant in *Moody* had been tried twice and convicted each time before a jury.

U.S. v. *Phillip William McKinney,* 427 F.2d 449 (6th Circuit 1970), is another case in this judicial circuit that was appealed on the grounds that the sentence of five years was excessive and out of proportion to the offense. In this case, McKinney was convicted without a jury for refusing to submit to induction in the Armed Forces. The case was remanded to the District Judge for reconsideration of the sentence. The Court of Appeals stated (page 455):

> "We are concerned with the propriety of imposition of the five years' prison sentence in this case. There was sufficient evidence in this case from which the trier of fact could find that McKinney knowingly refused to submit to induction; however, the record shows that McKinney at all times was willing to serve his country in a noncombatant capacity. The record discloses no prior criminal record. Under these circumstances, we are of the opinion that the maximum sentence was excessive and out of proportion to the offense."

We respectfully call to the Court's attention that in this case (*McKinney*) and the other cases cited herein, the Court placed special emphasis on *no prior criminal record* (emphasis supplied).

In *U.S.* v. *Robert Driscoll,* 496 F.2d 252 (2d Circuit — decided 5-6-74), the defendant, Driscoll, appealed an order of the District Court denying his motion for reduction or modification of sentence. The Appellate Court would not review the sentence, but suggested that the sentence of 12½ years on importation and possession of narcotics might be reviewed sua sponte by the district judge, in view of the nature of the offenses, and the fact that the defendant did not appear to be a hardened recidivist or a person posing serious threat to society.

The Appellate Courts will review this area of sentencing where the facts indicate harsh or cruel punishment. This conclusion is forcibly brought home in the court's opinion in *Driscoll,* supra:

> "Judge Travia's failure to state the reasons for the sentences totaling 12½ years in prison, which appear rather harsh on the record before us, raises a more serious question. We have, it is true, eschewed appellate review of sentences that are within statutory limits, at least in the absence of evidence that the sentencing judge relied upon constitutionally impermissible factors, and we have refused to require a sentencing judge to state his reasons. See *McGee* v. *United States,* 462 F.2d 243 (2d Cir. 1972); *United States* v. *Brown,* 479 F.2d 1170, 1172 (2d Cir. 1973). However, we have encouraged the sentencing judge to state his reasons, especially where to do so would clarify doubts as to possible reliance upon misinformation of constitutional magnitude or failure to consider mitigating circumstances. See *United States* v. *Brown,* 479 F.2d at 1173. In view of the apparently unwarranted harshness of the consecutive sentences imposed, a statement of reasons would have been welcomed by us in the present case. At the time of sentencing appellant was 29 years of age. Although his minor dealing in narcotics, his brief resistance to arrest, and his fleeing the jurisdiction, could hardly be condoned and called

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for imposition of a prison sentence, he does not appear to be a hardened recidivist or a person posing a serious threat to society. Indeed, Judge Travia agreed that appellant's conduct in using hashish and marijuana was a 'victimless act' (A-69a). He further conceded that there was 'nothing before this Court which indicates that the crimes involved here have hurt anybody besides the defendant' (A-69a) and that 'there is nothing before the Court which indicates there was any organized crime involvement or any profit motives' (A-69-70). Nevertheless he imposed sentences totaling 12½ years."

The rationale and conclusion reached in *Driscoll* can be readily compared with the facts present in the case at bar (i.e. Duane Lee Vincent).

VI. CONCLUSION

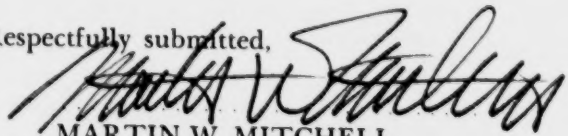
It is respectfully submitted that

(1) The sentence of imprisonment for one year is cruel, harsh and unusual punishment.

(2) The sentence reflects gross abuse of discretion by the District Court.

It is respectfully requested that this case be remanded to the District Court for reconsideration of the sentence of imprisonment.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 74-2218

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DUANE LEE VINCENT,
Defendant-Appellant.

ORDER

(Filed February 20, 1975)

BEFORE: CELEBREZZE, McCREE, and LIVELY, Circuit Judges.

This appeal from a sentence pronounced after conviction of violation of 26 U.S.C. § 7203, upon a plea of guilty presents the single issue whether the district court abused its discretion by imposing twelve months imprisonment, the maximum custodial time permitted by statute. Appellant had been indicted in three counts, each charging willful failure to file income tax returns for three separate years. Two of the counts were dismissed after the sentence was pronounced on the third count. The maximum permissible penalty under each count is imprisonment for one year or a ten thousand dollar fine or both. Since the

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sentence imposed was within the limits permitted by the statute, we have no control over the sentence except in the narrow area where the sentencing court does not exercise at all its sentencing discretion. *Dorszynski* v. *United States,* —— U.S. ——, decided June 26, 1974; *United States* v. *Daniels,* 446 F.2d 967 (6th Cir. 1971). Here, the record of the sentencing proceeding reveals that the district judge exercised discretion in formulating the sentence.

We observe that appellant may move the court to reduce the sentence under Rule 35 F.R.Cr. P. within 120 days after receipt of the mandate of this court. In making this observation, we intimate no opinion about the disposition the court should make in the event a motion should be filed.

For the foregoing reasons, it is ORDERED that the judgment is hereby affirmed.

Entered by order of the court

/s/ JOHN P. HEHMAN,
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1556

DUANE LEE VINCENT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an attorney, was charged in a three-count information with having willfully failed to file federal income tax returns for the years 1968, 1969, and 1970, in violation of 26 U.S.C. 7203. The information alleged that petitioner's gross income for 1968 was $13,929; that his gross income for 1969 was $22,393.17; and his gross income for 1970 was $23,515 (App. 3-4).[1] Petitioner entered a plea of guilty to Count III, and the other two counts were dismissed on the government's motion. The court sentenced petitioner to twelve months' imprisonment (App. 35). The court of appeals affirmed (Pet. App. 1a-2a).

[1] "App." refers to the appendix filed in the court of appeals.

The judgment of the court of appeals was entered on February 20, 1975 (Pet. 1; Pet App. 1a), and the petition for a writ of certiorari was filed on June 10, 1975. The petition is therefore substantially out of time under Rule 22(2) of the Rules of this Court.[2]

Petitioner's sole contention is that he was improperly sentenced to one year in prison on his plea of guilty. But the sentence was within the limitations set forth in 26 U.S.C. 7203. There is accordingly no basis for review of the sentence. See, *e.g.*, *Dorszynski* v. *United States*, 418 U.S. 424, 431; *Gore* v. *United States*, 357 U.S. 386, 393; *Townsend* v. *Burke*, 334 U.S. 736, 741.

Contrary to petitioner's argument (Pet. 5), the trial court considered all the relevant facts in imposing sentence upon him. Following entry of the plea of guilty, petitioner's counsel presented the court with a pre-sentence memorandum (App. 18). The court thereupon heard four witnesses who testified on behalf of petitioner (App. 18-30). The court also considered a pre-sentence report and was aware that petitioner had eventually filed the return in question and paid the $2,548 of taxes due (App. 34). Before pronouncing sentence, the court spoke of its knowledge of petitioner and his family (App. 32-33) and commented on the testimony given by petitioner's witnesses (App. 34). Taking all of these facts into consideration, the court determined that a sentence of twelve months was appropriate in this particular case (App. 35).

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[2]On March 5, 1975, petitioner filed in the court of appeals a motion for an extension of time in which to file a petition for rehearing. This motion was denied on March 28, 1975 (Pet. 1).

United States v. *Daniels*, 446 F.2d 967 (C.A. 6), and *United States* v. *McKinney*, 427 F.2d 449 (C.A. 6), relied upon by petitioner (Pet. 5, 7), are not in point. In those cases, the court found that maximum sentences had been imposed without regard to the circumstances of the individual defendants. *Williams* v. *New York*, 337 U.S. 241; *United States* v. *Moody*, 371 F.2d 688 (C.A. 6). Here, however, petitioner has merely disagreed with the sentencing court with respect to the effect the alleged mitigating circumstances should have had on his sentence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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